

would think also fear of reciprocity should be added. There is no certainty of prosecution for violations of these prohibitions.

You may conclude, from what I have said that we have gained little ground in holding individuals responsible for violation of the prohibitions of the laws of armed conflict. I would suggest to you that the ad hoc tribunals of Nuremberg and the Far East at the close of World War II were unique and necessary and that the trials arising out of the Vietnam incident, regardless of the decision reached in a particular case, were equally necessary. To say that this system of accountability has failed because all persons who violated the prohibitions cannot be found and punished would condemn all criminal law systems to failure. We, as a civilized country, and any nation so claiming a national morality, can and should punish its citizens who violate the laws of armed conflict. We must also see to it that those not of our citizenry who violate basic rules of human behavior are brought to the bar of justice. More importantly, we must insure that our people are fully educated and well-trained in the requirements of the law of armed conflict, that these rules of war are integrated into our own personal moral codes and integrated into our military thinking and basic military doctrines. Only by such training and total integration into our thinking can observance of the law be more successfully achieved.

MAJOR GENERAL VAGUE: To abate your breathless anticipation, we now have a mystery speaker who will speak briefly on "State Responsibility for Compliance with the Laws of Armed Conflict." I think he has had some connection with the Geneva Conference on the Laws of War, because he has been spending an enormous amount of my travel money flipping back and forth across the Atlantic as a member of the United States Delegation in Geneva for the last three years. He is the Chairman of your Committee. It is my pleasure to present my Assistant, General Walter Reed.

The State's Responsibility for Compliance with the Law of Armed Conflict

BRIGADIER GENERAL WALTER D. REED

Each of the panelists has been talking about various aspects of the state's responsibility. I am not going to repeat what they have said. But I think it's important that we sum up on this question because it's a little bit broader than the sum of each of the individual presentations today.

First, a state's obligation in this context has several parts. States have the primary responsibility to assure that legal restraint exists during wartime. States acting individually and collectively establish and formulate the law applicable in armed conflict. We have heard today about that process in Geneva. It may be worth repeating that civilized states have an obligation to participate in efforts to formulate rules which are practical and which provide maximum protection for civilians and other protected innocent victims during armed conflict while incorporating the reality of armed hostilities into those rules. This is a difficult and seemingly impossible task, but the United States and the United Kingdom are carrying out their responsibility to try to formulate those practical rules with an honest and diligent effort. As our Secretary of State said last year at the American Bar Association meeting in Montreal: "The United States is committed to the principle that fundamental human rights require legal protection under all circumstances, that some kinds of individual suffering are intolerable no matter what threat nations may face."

The second responsibility of a state is to insure that machinery exists within the domestic structure which will facilitate dissemination, understanding and enforcement of the law. And I would emphasize the need for all three factors. The United States has been one of the early leaders in formulating humanitarian rules applicable in armed conflict. But if we expect the rules to be complied with we have to have them widely disseminated. It is not enough to disseminate them throughout the armed forces in peacetime; it is not enough to confront the soldier with these rules for the first time when he enters the armed forces shortly before going into combat. The civilian population needs to hear more about this body of rules.

Third, there must be understanding that the state owes an obligation to its own people and to the world community to assure that the rules are understood. Now this involves more than just distributing the printed rules. It involves an educational process both in the civilian and in the military communities. We cannot rely solely upon our social structure to impose a high moral code; something like the conduct of "English gentlemen" that Sir David referred to. In the combat environment, a moral code not based on training and discipline can and will break down. I believe there is no question about the high standard of moral conduct of the U.S. serviceman under normal conditions. But in combat, when he is living with the constant threat of death, often from an unseen enemy; when he is seeing his friends and associates killed by attacks often from women, sometimes children, when you couple that with placing in his hands the tremendous fire power capable of destroying the enemy, then the usual reliance upon moral restraint perhaps isn't enough. It requires greater training and understanding and discipline, and requires training under simulated combat conditions. I don't in any way endorse or excuse attacks on innocent civilians or innocent victims of war, but I think we have to realize that the question is

broadier than just providing rules and short term training for military personnel when they enter the armed forces or immediately prior to entering battle. The Department of Defense has taken the first steps, and important steps, toward education and training. But I think this aspect of understanding within the civilian community is essential to achieve acceptable standards of compliance.

And then there is enforcement. It is most important to incorporate the legal limits into the Rules of Engagement. The Rules, as they now stand, are general. An effective system of enforcement requires rules promulgated with such certainty that all elements can be examined and evidence submitted to a competent tribunal, and the accused individual given an opportunity to present evidence and defend himself. Existing United States law provides for the enforcement of the laws of war. Article I of the Constitution provides that Congress has the power to make rules for the Government of the Land and Naval Forces and the power to define and punish offenses against the Law of Nations. In the exercise of that authority Congress has provided for jurisdiction to punish violations of the laws of war and has fixed that jurisdiction in courts-martial. It has also recognized a concurrent jurisdiction in military commissions, and other military tribunals. However, as efforts are undertaken to make the humanitarian rules more specific, I think consideration has to be given to the need for greater codification and to provide individuals with the judicial safeguards to which they are entitled under our traditional standards of fairness.

Mr. Wiley has spoken about another responsibility. The responsibility for reporting and investigating violations. The idea of victor's justice is no longer acceptable. States cannot, as a matter of practice, sweep under the rug violations of their own forces and look only to the excesses of the enemy. No rule of humanity can exist under those conditions.

So in conclusion, I would say that the state's responsibility for compliance requires, first, that states continue to strive to formulate practical rules. Second, they must disseminate those rules throughout their entire populations. Third, states must assure a degree of understanding throughout their population through education and training. And fourth, states must provide for enforcement and in appropriate cases, punishment for violations. Now that may be utopia, but I believe civilized nations must never cease trying to achieve those goals.

Questions and Answers

The following questions were asked by members of the audience.

Q. Is there anything the United Nations is doing to develop either a limitation on weapons or a general alleviation of the problems of suffering in time of war?

AMBASSADOR ALDRICH: I think most progress is being made outside the United Nations: in the conferences in Geneva and in conferences related to the United Nations but conducted somewhat separately, such as the Conference

of the Committee on Disarmament in Geneva, which mainly deals with specific weapons limitation questions. But the issues are discussed every fall in the General Assembly. There are resolutions which may be helpful or not, urging greater progress. But by its nature, the United Nations is both too big and too small to deal with the problem. In general, the United Nations is encouraging the effort but it is not trying to take it over.

Q. How are the Hague Regulations and the Geneva Articles being reconciled to the stockpiling of hydrogen bombs?

AMBASSADOR ALDRICH: You put your finger on a very sensitive difficulty. One thing that seemed clear to us when we started these negotiations was that in trying to codify for the first time since 1907 the laws of combat warfare, we had a choice to make. Either we could try to take into account the use of nuclear weapons and weapons of mass destruction, or we could try to limit ourselves to the development of law for a conflict which did not use weapons of mass destruction. We decided that the latter was the more sensible approach, because if we tried to develop rules which had to be flexible enough that they could also be squared with the use of weapons of mass destruction, the rules would be meaningless for any other kind of conflict. Therefore, what we are trying to do in Geneva is to develop combat rules that apply to general warfare but not to the use of weapons of mass destruction. We simply said that the use of weapons of mass destruction is beyond the competence of that conference and has to be dealt with in disarmament forums, like the SALT talks with the Soviet Union, and possibly in other initiatives.

ADDITIONAL COMMENTS FROM MR. WILEY: I would like to add that, as far as the legal review of new weapons program by the Defense Department is concerned, notwithstanding what Mr. Aldrich has said about the Geneva negotiations, it is definitely part of our Departmental Weapons Review Program to review new weapons developments which involve nuclear devices. That would not only be in the tactical field but also involving strategic nuclear weapons. One of the elements of American policy in recent years has been to refine the accuracy of its strategic nuclear weapons and this has been the subject of great debates in various quarters. Nuclear weapons will come under legal review. The same underlying legal principles are applied to the extent feasible, in both the pre-engineering developments stage and in the production decision phase.

Q. Have the third-world nations taken any action in the Geneva Negotiations to limit developed countries to the use of spears?

SIR DAVID HUGHES-MORGAN: A distinguished delegate from an African country complained bitterly at the first session in Geneva about the use of sophisticated weapons against people who didn't have them. He called first for the prohibition of aircraft against unsophisticated countries, then for the prohibition of any sophisticated weapons, and, finally, said he really meant to call for the abolition of suffering. Now the difficulty in answering your question is

that it covers not merely the field that we mentioned but the work of the Ad Hoc Committee, which is dealing with possible prohibitions of certain categories of conventional weapons. The interesting thing is that the third-world countries are the ones calling for the abolition of such weapons as napalm. In fact, napalm is a pretty cheap weapon. The delivery system may be on the expensive side, but it is the sort of weapon an undeveloped country might want to use. These countries do, however, call for its abolition. Now, I am saying that as a matter of strict law, providing you attack military objectives individually, not collectively as in areas of target, and assuring you can aim the weapon with reasonable accuracy, there is nothing unlawful in using that weapon against targets in populated areas. But the moment you miss too many targets, and the moment too many civilians are killed, you are going to get the *ex post facto* judgment to which I referred and you will be accused of being in breach of Article 46. For that reason, and the sort of smallish wars that are reported in the media, which excite world interest, I think that states are going to have to pay very considerable attention to the accuracy of their weapon delivery system (provided that they worry about world opinion at all; because there are some states that don't). I can equally foresee the possibility of war crimes trials in the future where the prosecution allegation will be a breach of Article 46, supposing it becomes law, and the defense will be that, "We were aiming at a proper military target, but it is unfortunate we couldn't afford to buy the expensive smart type arms which would have hit it. We are very sorry." Whether a court will accept that defense or not will have to be judged when the time comes.

Q. Is the United States meeting its responsibility to search out and try war criminals inasmuch as there has been no attempt to revise the Constitution or laws so as to try people who are out of the service by court-martial and who are not otherwise triable by a federal court at this time?

MAJOR GENERAL VAGUE: Given the limitations on the legal means, as illustrated by the *Calley* and *Medina* trials, the U.S. Government and the Army in particular, is doing its best to bring violators to justice. The question certainly points out some inadequacies in jurisdiction. But the government is not an undivided whole. We are trying to have a remedy, but without the necessary cooperation from the Congress thus far. Now there are other members of the panel who may be better qualified than I to respond.

AMBASSADOR ALDRICH: I think there isn't any question that a more complete system of criminal jurisdiction to try war crimes is needed in the United States. It does not necessarily have to be a court-martial jurisdiction. But something is needed to insure that Americans who are accused of war crimes are not simply allowed to go scot-free because there is no court to try them. We all recognize the difficulties and political problems involved in extradition are such that it would not be a very promising recourse. Therefore, we had better find ways

to create jurisdiction ourselves. I wouldn't really be able to comment on the efforts we have been making in this regard, because I think more has been done by the Defense Department than by the State Department, but I trust, at any rate, that we won't get something done before such time as we are presenting the new Protocols to the Senate. We had better be introducing some implementing legislation then.

MR. WILEY: I have just one comment. If we can get more complete and prompt reporting than has been the case in various circumstances prior to this point in time, then action can be taken against various people before they may leave active military status. The lawyers are being given the job on the theory that they are independent professionals reporting directly through their professional command channels any violations which may not be reported or may be blocked in reporting up through the regular command channels. That puts quite a burden on the lawyers, but it is being put there because they are just that, independent professionals.

